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No. 84-1538

In The

Supreme Court of the United States

October Term, 1984

ALEXANDRA FISHER, et al.,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, et al.,

Appellees.

On Appeal from the Supreme Court
of the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THADDEUS A. FERENC AND RONNIE L. OVERTON IN SUPPORT OF APPELLANTS

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INTERESTS OF AMICI

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation, Thaddeus A. Ferenc, and Ronnie L. Overton respectfully submit this brief amicus curiae in support of appellants. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting broad public interest. Policy for Pacific Legal Foundation is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only when it concludes that Pacific Legal Foundation's position has broad support within the general community. Pacific Legal Foundation's Board of Trustees has authorized the filing of this brief. Thaddeus A. Ferenc and Ronnie L. Overton are joint owners of a small rental housing property in the City of Berkeley and are plaintiffs in a lawsuit in which they challenge actions taken against them under the Berkeley Rent Stabilization and Eviction for Good Cause Ordinance (Berkeley Ordinance) at issue in this case. Messrs. Ferenc and Overton and their attorneys from Pacific Legal Foundation have gained substantial insight into the working of the Berkeley Ordinance and the need for the protection of the consumer welfare in the Berkeley rental housing market.

These interests and the long-standing public policy perspective of Pacific Legal Foundation in support of the free enterprise system and the protection of consumer welfare by competitive markets will help to provide this Court with a more complete briefing of the interests at stake in this litigation.

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OPINION BELOW

The opinion of the California Supreme Court is reported at 37 Cal. 3d 644 (1984).

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STATEMENT OF THE CASE

The Berkeley Rent Stabilization and Eviction for Good Cause Ordinance was adopted as an initiative measure in June, 1980. Plaintiffs challenged the ordinance as being facially invalid under several constitutional claims. The question of the possible violation of federal antitrust laws was not raised until after a hearing had been granted by the California Supreme Court. *Fisher v. City of Berkeley,* 37 Cal. 3d 644, 710 (1984) (Bird, C.J., concurring). Therefore, without a record, this antitrust challenge is limited to the face of the ordinance.

The California court apparently conceded that even limited to a facial review, the Berkeley Ordinance could not survive a traditional antitrust violation analysis. *Id.* at 666-67, 672, 678. The court, therefore, found it necessary to abandon "traditional antitrust rules" and to adopt a "modified standard" which would "recognize a public welfare 'defense' to alleged violation of the antitrust laws by municipalities." *Id.* at 673.

The Berkeley Ordinance on its face presents at least two serious conflicts with antitrust principles of a type usually considered to be per se violations of the federal law. The first violation is price fixing from the combined effect of Sections 10, 11, and 12 of the ordinance to

fix prices at the level "actually due and payable on, or last preceding, May 31, 1980." Berkeley Ordinance § 10(a). Any allowed adjustments are also fixed through the consideration of nonmarket factors by the landlord or tenant in conjunction with the rent stabilization board. Berkeley Ordinance §§ 11 and 12. The price fixing aspect of the ordinance operates to protect tenants against "unwarranted rent increases" (Berkeley Ordinance § 3) and to protect landlords against the loss of "a fair return on investment" (Berkeley Ordinance § 12(c)). The second violation which is clear on the face of the ordinance is the requirement that landlords engage in a concerted refusal to deal with any prospective tenants who may be interested in units occupied by existing tenants. Berkeley Ordinance § 13.

Thus, this case is a remarkably simplistic presentation of two very important questions: (1) Did the California Supreme Court apply the correct standard for determining whether municipal ordinances are preempted by federal antitrust laws when those ordinances require conduct which has traditionally been considered to be a per se violation of federal law? (2) Under the proper standard, is the Berkeley Ordinance on its face in conflict with federal antitrust laws?

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SUMMARY OF ARGUMENT

The premise of the California Supreme Court that Congress did not intend that traditional federal antitrust

rules would be applied to municipalities is refuted by the Local Government Antitrust Act of 1984. That statute allows special considerations for municipalities only by limiting the relief which can be granted, and the legislative history makes clear that Congress considered and rejected the alternative of modifying existing standards for establishing violations by municipalities of federal antitrust laws.

The provisions of the Local Government Antitrust Act of 1984 combined with the availability of state action immunity, the burdens on any plaintiffs suing municipalities, and the discretion available to the court when fashioning injunctive relief substantially eliminate any purported threat to local governments. Only speculation suggests that the national policy favoring competitive markets cannot be accommodated by reasonable administration of the local police power.

The traditional per se standard of violation applied to price-fixing arrangements may be appropriately applied to the Berkeley Ordinance which on its face violates the principles underlying the antitrust laws and codifies anticompetitive actions to be expected of private persons attempting to protect their market position in the situation where supply is insufficient to meet demand.

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ARGUMENT

I

THE LOCAL GOVERNMENT ANTITRUST ACT OF 1984 ESTABLISHES THAT CONGRESS DID NOT INTEND THAT ALLEGED VIOLATIONS OF THE SHERMAN ACT BY LOCAL GOVERNMENTS ACTING PURSUANT TO THEIR POLICE POWER BE JUDGED BY STANDARDS UNIQUE TO MUNICIPALITIES

The California Supreme Court described its decision in this case as a rejection of "[t]raditional antitrust rules [which] have been fashioned over the years in the context of private business regulation" (*Fisher v. City of Berkeley,* 37 Cal. 3d at 664) and the adoption instead of "a test modeled after the court's commerce clause cases" (*id.* at 675). This dramatic change in federal antitrust principles was justified on the basis of that court's conclusion that "most municipal actions would be found to violate the law" under traditional rules and the result would be that "'a municipality's power to regulate the economy would be all but destroyed.'" *Id.* at 672. The court justified its course of conduct by suggesting that it "cannot believe that Congress intended such results." *Id.* However, in a most exceptional oversight the California Supreme Court ignored a federal statute approved two months prior to its decision, by which Congress addressed the same concerns, rejected the solution adopted by the state court, and enacted an alternative method to limit the effect of antitrust liability on municipalities.

The Local Government Antitrust Act of 1984, Pub. L. No. 98-544 (Oct. 24, 1984), 15 U.S.C. §§ 34-36 (Local Government Act), was enacted to address the concerns that

"antitrust suits, and threatened suits . . . could undermine a local government's ability to govern in the public interest." H.R. Rep. No. 98-965, 98th Cong., 2nd Sess. 2 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 4603 (Leg. Hist.). This statute controls the issue presented in this case. The city's claim that relying on competition to protect the public interest is inappropriate when applied to limit the exercise of the local police power is a challenge to the policy underlying the federal antitrust laws and therefore is a question for resolution by Congress and not by the judiciary. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 221-22 (1940). Congress has now expressly considered and has decided how to accommodate the local police power with the federal antitrust laws.

"The task of defining the objectives of public policy and weighing the relative merits of alternative means of reaching those objectives belongs to the legislature." *Lowe v. Securities and Exchange Commission,* — U.S. —, 53 U.S.L.W. 4705, 4713 (June 11, 1985) (White, J., concurring). The legislative history of the Local Government Act makes clear that Congress has completed this task. After fully considering the concerns raised by the California Supreme Court, Congress rejected proposals similar to that adopted by the California court which would have amended the law to preclude or to reduce the legal bases on which to raise antitrust challenges to actions by municipalities. Six different bills proposed alternative means for relief for local governments. The different proposals included:

"A. Municipal immunity tied to State immunity

"B. Municipal immunity based upon the nature of the activity

"C. Municipal Rule of Reason Test

"D. Remedy approach." Leg. Hist. at 4614-19.

After full consideration of the various options, Congress adopted in the Local Government Act only the "remedy approach." Expanded municipal immunities were rejected in the face of testimony on behalf of states that the concept undermined the authority of the states in a federal system of dual sovereigns. Leg. Hist. at 4612 n.19. The "Municipal Rule of Reason" test which was considered but not adopted is essentially the same as the "modified standard" adopted by the California Supreme Court. Although that court claimed to "decline to analyze municipal conduct under a so-called 'municipal rule of reason'" (*Fisher*, 37 Cal. 3d at 673-74 n.25, 675-76 n.28) that term is general in nature and covers "several proposals." Leg. Hist. at 4616. The concept as described in the legislative history is a test which asks:

> "[C]ould the unit of local government have achieved its safety, its health, its public welfare objective in a way less retrictive [*sic*] of the Federal interest in competition, less harmful to the consumer." Leg. Hist. at 4617.

This test closely tracks that set forth by the California Supreme Court which asks if "the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies." *Fisher*, 37 Cal. 3d at 675. Congress, therefore, in rejecting the "municipal rule of reason test" rejected the very test adopted by the California Supreme Court. Moreover, the legislative history makes clear that Congress also considered and rejected the rationale the California Supreme Court used to propose a different standard.

In rejecting the use of traditional antitrust rules the state court focused its attention only on its concern over "unwarranted interference with a municipal government's legitimate exercise of its police power." *Id.* at 673. The court simply rejected out of hand the notion that legitimate interests of market participants consistent with federal antitrust policies might be frustrated by municipal actions. According to the California Supreme Court "[t]here is nothing to suggest" such concerns. *Id.* at 669. Congress on the other hand clearly recognized the competing interests and focused its concern on the need to "weigh the chilling effect of potential or actual antiturst [*sic*] litigation on local governments and their officials against the need to preserve some right of redress for private persons (including consumers) harmed by anticompetitive conduct." Leg. Hist. at 4614. After weighing these competing considerations Congress rejected proposals to cut back on the ability to maintain traditional antitrust actions against municipalities in favor of cutting back on the remedies available in such actions.

> "The Subcommittee did not adopt the concept of a ban against private actions aimed at municipalities and their officials. The role of 'private attorneys general' in the antitrust enforcement scheme remains central. If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time. The record does support, however, the notion that municipalities—and their taxpayers who must ultimately shoulder the burden—should not be subject to punitive sanctions in the form of treble damages.

> "The Subcommittee considered permitting actual damage recovery by private persons injured by local governmental actions. . . .
>
> "The Subcommittee was persuaded, however, that the most balanced legislative response at this time would be to restrict private remedies to injunctive relief." Leg. Hist. at 4619.

The "chilling effect" on local government from the application of the antitrust laws which Congress recognized and considered is the same consideration which led the California Supreme Court to conclude that it needed to develop new substantive standards by which to judge alleged violations of antitrust laws by municipalities. *Fisher,* 37 Cal. 3d at 672. Congress, however, after balancing the competing interests chose to grant relief in a different way by modifying the remedy and leaving alone the standards for determining a violation.

> "The bill eliminates certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law. For example, there will be no change in the substantive antitrust law applicable to local governments, or persons with whom they deal, in suits for injunctive relief under Section 16 of the Clayton Act." Leg. Hist. at 4603.

There can be no question that Congress clearly understood that "the substantive antitrust law applicable to local governments" would be the traditional "per se" test and when appropriate the traditional "rule of reason" test which "weigh the procompetitive and anticompetitive tendencies of a particular practice in deciding whether that conduct violates the antitrust laws." Leg. Hist. at 4616.

The legislative history also makes clear that Congress considered and rejected the approach of "'legislatively

overruling'" the principle established by this Court in *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978), "that 'social' or 'public interest' values" cannot be used to justify anticompetitive conduct in violation of the Sherman Act. Leg. Hist. at 4617. This Court ruled in *National Society of Professional Engineers* that the substantive standard to be applied is whether the action "is one that promotes competition or one that suppresses [it]" (435 U.S. at 691) and that "that policy decision has been made by Congress" (*id.* at 692). Congress' refusal to change that policy by incorporating in the Local Government Act any provision for a "social" or "public interest" defense is a direct contradiction of the California Supreme Court's decision that it "must develop tests that recognize a public welfare 'defense' to alleged violation of the antitrust laws by municipalities." *Fisher,* 37 Cal. 3d at 673. Congress was not willing to risk the national policy favoring competition by providing such a lower standard for the conduct of municipal officers. Congress simply rejected the notion that "the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury." Leg. Hist. at 4619. After careful consideration of the same arguments which the California Supreme Court found persuasive, Congress concluded that the national policy favoring competition could only be protected from local political influences, whether well meaning or not, by requiring a showing that the local government's actions were taken to protect competition.

It is not surprising that the Congress and the California Supreme Court differed considerably in the weight

each gave to the competing national and local interests involved. The state court gave heavy weight to the protection of municipal powers and ignored those interests which are protected by the antitrust laws. Congress on the other hand recognized and considered both interests to be important. To protect both interests Congress of necessity reached a result markedly different from that of the California Supreme Court. By ignoring the Local Government Act the California Supreme Court has in effect granted double relief to municipalities. The combined result of the limitation of remedies enacted by Congress and the limitation on the ability to state a claim under the ruling of the California court will be that few, if any, antitrust suits will ever be brought against local governments. That result is contrary to the intent of Congress that antitrust actions against municipalities be allowed to continue and that the "'private attorney general'" role is to "remain[] central" in the antitrust "enforcement scheme" which is "aimed at municipalities." Leg. Hist. at 4619.

II

APPLICATION OF TRADITIONAL ANTITRUST RULES TO LOCAL GOVERNMENTS DOES NOT POSE A THREAT TO THE EFFECTIVE USE OF THE POLICE POWER

The argument that the application of traditional antitrust rules to municipalities will destroy the police power (*Fisher*, 37 Cal. 3d at 672) rests on the assumption that many plaintiffs will obtain significant relief against many municipalities after proving that many municipal ordinances violate the Sherman Act. There is at present no basis for such an assumption.

Initially, the state action exemption established by *Parker v. Brown*, 317 U.S. 341 (1943), continues to protect municipalities whose conduct is consistent with "clearly articulated state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. —, 105 S. Ct. 1713, 1721 (1985). The California court's desire for recognition of the difference in motives between municipalities and "unrestrained business competitors" (*Fisher*, 37 Cal. 3d at 668-69) is accommodated under this state action exemption when the municipality is sued as an actor. Because of the recognized differences in motives, the state action exemption is more readily applied for the benefit of municipalities without the requirement for the showing of active state supervision. *Town of Hallie*, 105 S. Ct. at 1720-21. For the many circumstances in which municipalities act under state authorization, it is not a significant burden to require that that authorization "show that '"the legislature contemplated the kind of action complained of"'" (*id.* at 1719, quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978), quoting the decision of the Court of Appeals, 532 F.2d 431, 434 (5th Cir. 1976)) before allowing municipalities to establish economic policy contrary to that set by Congress. "Such a proviso recognizes that local governments are not federal agencies or a third sovereign form of government." Leg. Hist. at 4614 n.19.

Given the breadth of the state action exemption, the asserted problem is reduced to circumstances of "home rule" municipalities acting without explicit state authority. As the Berkeley Ordinance demonstrates, it is in just such circumstances that local market participants may be most likely to be able to obtain economic protection

based solely on the parochial interests of a local community. It is also in such circumstances that other persons wishing to compete for a scarce resource and the public welfare interest in an adequate supply of the resource may be most in need of the protection of the antitrust laws.

Any asserted serious threat to the legitimate authority of local governments in these circumstances has not materialized in the years since this Court's decision in *Community Communications Co. v. Boulder,* 455 U.S. 40 (1982). Leg. Hist. at 4612-13. Now as a result of the Local Government Antitrust Act of 1984 Congress has acted "to readjust the litigation advantages and disadvantages more equitably for local government defendants." Leg. Hist. at 4620. Municipalities have been granted significant relief which reduces to a minimum the number of antitrust suits which can reasonably be expected to be brought against them. By limiting the remedy to injunctive relief and not allowing costs or attorneys' fees, Congress expected that future litigation will be limited to those situations where the actions of local governments are such serious intrusions into the competitive market that potential litigants can justify the *present* very high cost of litigation with the expected *future* increase in economic benefit from the limited remedy of an injunction. The legislative history even suggests that of those few who can justify initiating such litigation many will be screened out after a motion for preliminary injunction when the plaintiff must face the reality of an initial setback, if the injunction is denied, or of the cost of posting a substantial bond if the injunction is granted. Leg. Hist. at 4619-20.

Even when a challenge is maintained, municipalities are not helpless in the hands of the courts . "A plaintiff

seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.,* — U.S. —, 53 U.S.L.W. 4733 (June 11, 1985). Other than the relatively few circumstances when the per se rule should apply, the actions of municipalities would be measured under the rule of reason which this Court has demonstrated is sufficiently flexible to accommodate exceptional circumstances where the need for anticompetitive regulation can be justified on a market basis. *Broadcast Music, Inc. v. Columbia Broadcasting System,* 441 U.S. 1 (1979). Moreover, the only relief available falls "under the courts' equitable jurisdiction" (Leg. Hist. at 4620), leaving the court discretion to recognize other regulatory actions and to protect legitimate local interests when fashioning appropriate relief. *See National Society of Professional Engineers,* 435 U.S. at 698-99. Although the relief must restore competition, it may be "fit [to] the exigencies of the particular case." *International Salt Co. v. United States,* 332 U.S. 392, 401 (1947).

Only pure speculation suggests that local governments will be unable to conduct their affairs without engaging in repeated, unreasonable restraints on trade. Moreover, no showing has been made that despite limited application of the antitrust laws to local governments and after the substantial relief for municipalities under the Local Government Antitrust Act there can be any real concern that "application of traditional standards would prove too inflexible to accommodate legitimate governmental objectives that motivate municipal regulation." *Fisher,* 37 Cal. 3d at 664. It is all too early to give serious cre-

dence to the cry that the national policy favoring competitive markets cannot be accommodated by reasonable administration of the local police power.

III

THE BERKELEY RENT CONTROL ORDINANCE CAN BE FAIRLY JUDGED BY THE TRADITIONAL "PER SE" STANDARD APPLIED TO PRICE-FIXING ARRANGEMENTS

Although the California Supreme Court developed an elaborate criticism of the application of the "per se" rule to the Berkeley Ordinance (*Fisher,* 37 Cal. 3d at 667-71), it does not suggest why municipalities must engage in blatant price-fixing schemes in the first place. On the fundamental question of why the city had to adopt a practice which is considered so antithetical to the national policy favoring competition that it has been declared a "per se" violation, the court relies solely on its observation that "plaintiffs suggest no alternative, equally effective approach to achieving defendants' legitimate local purposes." *Id.* at 677. While this may be an accurate description of the record of this case (particularly since the California Supreme Court allowed the issue to be raised by an amicus curiae brief in that court with the parties having no opportunity to make a record on the issue, *see id.* at 710-13, Bird, C.J., concurring) it hardly justifies the conclusion that the national policy favoring competion should be sacrificed on the assumption that the city had no alternative but to adopt the most anticompetitive program possible.[1].

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[1] No discussion supports the California Court's exceptional holding that the burden rests on plaintiffs to prove the existence

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The analysis of the California Supreme Court is seriously flawed because it assumes that the Berkeley Ordinance has some legitimate purpose other than eliminating some form of competition. This assumption has no merit. "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *United States v. Trenton Potteries Co.,* 273 U.S. 392, 397 (1927). This general rule finds no exception in the Berkeley Ordinance which on its face sets its purpose to be the elimination of price competition.

The ordinance indicates that the "unwarranted rent increases" to be prevented are simply those increases caused by the pressure of demand against supply. The "findings" set forth in Section 2 of the ordinance mention "steadily rising rents, a shortage of decent housing, and an increased deterioration of the existing housing stock in the City." This conclusion is reinforced by the reference in Section 3 to a "housing crisis" which is apparently defined in Section 6(q) as being less than a 5% vacancy

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of alternative means "that would have a less intrusive impact on federal antitrust policies." *Fisher,* 37 Cal. 3d at 675. No reason appears to shift to plaintiffs a burden which has traditionally rested on defendants to justify anticompetitive conduct under an antitrust challenge and to justify discrimination against commerce under a Commerce Clause challenge. *See National Collegiate Athletic Association v. Board of Regents of University of Oklahoma,* 468 U.S. —, 104 S. Ct. 2948, 2967 (1984); *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 353 (1977). Considering the recognition by both Congress and this Court that local governments might discount national and statewide priorities to favor parochial interests (see Leg. Hist. at 4619; *Town of Hallie,* 105 S. Ct. at 1721; *City of Lafayette,* 435 U.S. at 410) municipal defendants should continue to bear the burden of justifying anticompetitive conduct.

rate. If the pricing restrictions may be lifted as provided in Section 6(q) when more rental units are available, then the reason for the price restriction must be an undersupply of rental units. Therefore, on its face the ordinance suggests that it was adopted because in the competitive housing market "a pattern of steadily rising rents" was occurring in response to some manner of housing "shortage." In simple terms, the ordinance states that its purpose is to address the effects of price competition in the rental housing market. It attempts to achieve this purpose by directly prohibiting any price competition. There is no attempt to justify this ordinance on other grounds; *e.g.*, fraud, discrimination, or other abusive practices. It is justified solely on a "cry of ruinous competition and competitive evils" which Congress has not allowed as a defense to price-fixing claims. *Socony*, 310 U.S. at 221.

The California court's analysis is also flawed because it fails to comprehend that the essence of price competition is competition between tenant and other tenants and between landlord and other landlords. Instead the opinion below treats price competition only as a consideration in the relationship between a landlord and a tenant and, therefore, does not recognize that the Berkeley Ordinance, which purports to address a problem between landlord and tenant, in fact prohibits all price competition among landlords and among tenants.

Consumer welfare is dependent upon price competition and "the legislative history of the Sherman Act shows consumer welfare to be the decisive value." Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & Econ. 7, 11 (1966). The Berkeley Ordinance does not provide protection for the general consumer welfare. It

merely protects the parochial interests of certain Berkeley residents who do not wish to have rival tenants compete for the housing resource. The ordinance in effect authorizes a cartel of existing tenants and creates a monopsony in the market for the rental units they occupy. The court below by focusing only on the landlord-tenant relationship ignored the real victims of the loss of competition—the prospective new tenants who are prohibited from competing for limited rental housing.

The analysis of the California Supreme Court not only fails to recognize the importance of price competition in protecting consumer welfare, it also treats price as if it were an independent concept without serious market ramifications beyond the direct relationships of individual landlords with individual tenants. That court's suggestion that the only basis for concern with price-fixing arrangements is that "unrestrained business competitors" cannot be trusted to maintain "reasonable" prices for the tenants (*Fisher*, 37 Cal. 3d at 668-69) ignores the teaching of this Court that the illegality of price fixing " 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' " *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982), quoting Rahl, *Price Competition and the Price-Fixing Rule—Preface and Perspective*, 57 Nw. U.L. Rev. 137, 142 (1962).

The public benefits of price competition far exceed the concept of "reasonable prices" and include such benefits as variety, quality, and availability of products to be achieved by encouraging experimentation, new developments, and entry into the market. *Id.* Lack of price competition may destroy "services and conveniences which

consumers desire and for which they are willing to pay." *Albrecht v. Herald Co.,* 390 U.S. 145, 152-53 (1968). Destruction of price competition also " 'impedes the ordinary give and take of the market place,' and substantially deprives the customer of 'the ability to utilize and compare prices in selecting [rental housing].' " *National Society of Professional Engineers,* 435 U.S. at 692-93.

Price-fixing schemes are uniformly condemned not because market participants cannot be trusted to set reasonable prices but "because of their actual or potential threat to the central nervous system of the economy." *Socony,* 310 U.S. at 226 n.59. Whether a price-fixing scheme is public or private and whether it is adopted for well-meaning or selfish ends, its result is always pernicious, and it cannot be condoned because of the certainty that it will destroy the benefits of a free competitive market. *Maricopa,* 457 U.S. at 351; *National Society of Professional Engineers,* 435 U.S. at 693-94; *Socony,* 310 U.S. at 221-22.

Thus, California state policy is to promote not only affordable rents but also "a decent home and a satisfying environment." Cal. Health & Safety Code § 50002 (West Supp. 1985). Such concepts vary with individuals and can only be achieved by allowing "the housing consumer [to] effectively choose within the free marketplace." Cal. Health & Safety Code § 50001(c) (West Supp. 1985).

The circumstances which led to the adoption of the Berkeley Ordinance are nothing more than the effect on that community of a recognized statewide problem that a "present and future shortage of supply in relation to demand . . . creates inflation in the cost of housing, by

reason of its scarcity, which tends to decrease the relative affordability of the state's housing supply for all its residents." Cal. Health & Safety Code § 50003(a) (West Supp. 1985). In response the state enacted extensive legislation to provide financial assistance to tenants and to encourage the development of new housing and the rehabilitation of older housing. *See generally* Cal. Health & Safety Code, Division 31 (West 1979) (Housing and Home Finance). In order to remedy the "shortages" the state adopted a "comprehensive and balanced approach to the solution of housing problems of the people of this state" (Cal. Health & Safety Code § 50003(d) (West Supp. 1985)) which expressly encouraged the development of "[a] healthy housing market . . . in which the housing consumer may effectively choose within the free marketplace" (Cal. Health & Safety Code § 50001(c) (West Supp. 1985)), and which expressly did *not* "authorize the imposition of rent regulations or controls" except for housing units receiving government assistance (Cal. Health & Safety Code § 50202 (West Supp. 1985)).[2]

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[2] Given the state policy that the shortage of rental housing is to be addressed by tenant subsidies, financing assistance, and other efforts to encourage development of new housing and that rent control of private housing operating without government assistance is not authorized by the state housing policy, there can be no reasonable argument that the Berkeley Ordinance follows a "clearly articulated state policy." Likewise there can be no doubt that the Berkeley Ordinance regulates an activity in interstate commerce. "The rental of real estate is unquestionably such an activity." *Russell v. United States,* — U.S. —, 53 U.S.L.W. 4652, 4653 (June 3, 1985). It is also clear that the ordinance requires that the price fixing be achieved through several combinations; among landlords (Section 10(a)), between the rent board and landlords or tenants (Section 12(a)), and between the rent board and other persons (Section 11(b)).

The Berkeley Ordinance, however, simply codifies the result that would be sought by private parties engaging in anticompetitive activity to protect their market position. Existing tenants are protected against "unwarranted" (market generated) rent increases (Berkeley Ordinance §§ 10, 11, and 12) and from competition by rival tenants who may wish to offer a bit more for their attractive rental. Berkeley Ordinance § 13. Landlords are supposed to be granted a "fair return on investment." Berkeley Ordinance § 12(c). Existing housing units put on the market for the first time must conform to the pricing practices of other landlords. Berkeley Ordinance § 10(a). As a practical matter the below market return and investment risk for new investors associated with rent control means little if any new construction. Cal. Health & Safety Code § 51600(d) (West Supp. 1985). *See also* Hazlett, *Resolving the Housing Crisis*, "Rent Controls and the Housing Crisis" 282-83 (M. Bruce Johnson ed. 1982). Therefore, Berkeley has responded to a statewide problem by an ordinance which requires anticompetitive conduct intended solely to protect Berkeley residents from the competitive market in rental housing. The winners are the present residents with protected market positions and the losers are the many, many others who would like to join the community and to enter the market on a fair (competitive) basis.

On its face the Berkeley Ordinance will do nothing to increase the number of rental units in order to reduce the "shortage." Prices fixed below market levels cause shortages; they do not reduce shortages.

> "A price suppressed below market-clearing levels will spontaneously create a shortage (excess demand at the controlled price), and consumers will *not* get the rental housing for which they are both able and *willing* to pay. This classic inefficiency is scrutinized in any standard micro-economics text." Hazlett, *supra*, at 278 (emphasis in original).

The state established alternatives of rent subsidies, government sponsored housing, financing assistance, and incentives to construct rental housing will work to reduce "shortage" but they will not protect the market position of existing Berkeley residents. In comparison the city's choice of a price-fixing program is suspect on its face. It is an example that "[t]he only real danger is that [municipalities] will seek to further purely parochial public interests at the expense of more overriding state goals." *Town of Hallie*, 105 S. Ct. at 1721.[3]

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[3] Although claiming to rest its new antitrust standard on this Court's Commerce Clause cases (*Fisher*, 37 Cal. 3d at 674), the California court failed to follow the teachings of this Court that under a Commerce Clause analysis "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Economic protectionism cannot be justified even under the Commerce Clause as the means to reach otherwise acceptable local ends. *Id.* at 626. The "problem" in Berkeley as set out on the face of the ordinance is that prospective tenants from outside the city want to compete with present residents of rental housing for a limited housing resource. *See, supra*, at 17-19. Because Berkeley is the location of the main campus of the University of California, many of these prospective tenants are from out of state. By not allowing outsiders seeking rental housing to compete with existing residents by offering a higher price (Berkeley Ordinance § 10) or on any other competitive basis (Berkeley Ordinance § 13), the ordinance ensures that existing residents have absolute preference over persons coming from outside of the city. Imposing the full burden of conserving a scarce resource on persons outside the city is an act which would be per se invalid under a Commerce Clause analysis as an "attempt by one [city] to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Philadelphia v. New Jersey*, 437 U.S. at 628.

Application of the "per se" rule is particularly appropriate to the Berkeley Ordinance which indicates on its face that it was adopted for purposes contrary to the principles underlying the Sherman Act. As the California Supreme Court readily acknowledged, the ordinance requires not only that the present tenants in the market be protected from price competition, but also that the present landlords be protected by a guarantee of a "fair return on his investment." *Fisher,* 37 Cal. 3d at 670. Applying the per se rule to invalidate a local ordinance which on its face states that it was adopted for the purpose of protecting the economic position of present market participants against competition would not constitute a serious incursion into the reasonable exercise of the local police power.

> "If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to the anticompetitive effect, a serious chink in the armour of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *City of Lafayette,* 435 U.S. at 410.

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CONCLUSION

Congress has responded to the expression of concerns over potential conflicts between the federal antitrust laws and the local police power. In adopting the Local Government Antitrust Act of 1984 Congress rejected alternative means of reducing the potential for conflict which were similar to the "modified standard" adopted by the California Supreme Court in this case. Given this action

by Congress and the lack of any showing that the application of the traditional antitrust rules to municipalities now poses any serious threat to the reasonable exercise of the local police power, this Court should reverse the decision by the California Supreme Court, reaffirm that traditional antitrust rules apply to municipalities, and declare the price-fixing requirements of the Berkeley Rent Stabilization and Eviction for Good Cause Ordinance invalid for requiring per se violations of the federal antitrust laws.

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Respectfully submitted,

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